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No. 90-16

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In the Supreme Court of the United States

OCTOBER TERM, 1990

SHENANDOAH BAPTIST CHURCH, PETITIONER

v.

ELIZABETH DOLE, SECRETARY OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Fair Labor Standards Act of 1938, 29 U.S.C. 201 *et seq.*, applies to petitioner's private school and the lay teachers petitioner employs.

2. Whether the Fair Labor Standards Act, as applied to petitioner's operation of its school, violates the First Amendment or the equal protection component of the Fifth Amendment.

3. Whether petitioner violated the equal pay provision of the Fair Labor Standards Act, 29 U.S.C. 206(d), by paying a "head-of-household" salary supplement to married male teachers.

4. Whether petitioner, for purposes of avoiding monetary relief under the Fair Labor Standards Act, had the burden of showing that underpaid employees' work was properly allocable to activities unrelated to its school.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A46) is reported at 899 F.2d 1389. The opinions of the district court are reported at 707 F. Supp. 1450 and 573 F. Supp. 320.

JURISDICTION

The judgment of the court of appeals was entered on March 30, 1990. The petition for a writ of certiorari was filed on June 28, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is an unincorporated religious association that operates the Roanoke Valley Christian School in Roanoke, Virginia, a preschool, elementary

and secondary school. The school, funded by tuition payments and donations, admits children of all religious faiths. Petitioner and its members view Christian education as a vital part of the church's religious mission. As a result, petitioner integrates biblical material into its teaching of academic subjects. Many of the school's teachers and employees considered their work to be a "personal ministry." 707 F. Supp. 1450, 1456 (W.D. Va. 1989). None of them, however, were "clergy in the sense of having been ordained, leading a congregation or performing such sacerdotal functions as baptisms or marriages." *Ibid.*; see *id.* at 1455; Pet. App. A3-A5, A20-A21; C.A. Supp. App. 61-62.[1]

Petitioner stipulated that, during the years 1976 to 1982, it paid 91 persons hired as support personnel less than the hourly minimum wage mandated by the Fair Labor Standards Act of 1938, 29 U.S.C. 201 *et seq.* These employees included bus drivers, custodians, kitchen workers, bookkeepers, and secretaries. The total wage shortfall amounted to $16,818.46. Some of these employees' work also benefitted petitioner's activities unrelated to its school. Pet. App. A7, A44.

From 1976 to 1986, petitioner paid a "head-of-household" salary supplement to all married male teachers, regardless of the individual's financial responsibilities for his family.[2] Petitioner did not pay

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[1] As petitioner's pastor explained, Baptists distinguish between "persons who hold such clerical offices as pastor, deacon or bishop and the ministry of all believers." 707 F. Supp. at 1456.

[2] The amount of the supplement declined over that period from $1600 in the 1976-1977 school year, when base salaries

any married female teacher such a supplement, even though at least three such teachers in fact were supporting their families.[3] Between 1981 and 1986, however, petitioner paid the supplement to three divorced female teachers with dependents. Petitioner stipulated that if all female teachers had been eligible to receive the supplement, petitioner would have paid them an additional $177,680 in total wages. Pet. App. A6-A7; 707 F. Supp. at 1455.

2. In 1978, as a result of petitioner's providing the "head-of-household" salary supplement only to male teachers and failing to pay minimum wages to covered employees, the Secretary of Labor filed this action against petitioner in the United States District Court for the Western District of Virginia.[4] The Secretary alleged that petitioner's actions violated the minimum wage and equal pay provisions of the Fair Labor Standards Act, 29 U.S.C. 206(a) and

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were $6,000, to $200 in the 1985-1986 school year, when base salaries had increased to about $12,500. Pet. App. A6.

Petitioner paid the supplement in order to attract teachers for specialized subjects. Since "the Bible clearly teaches that the husband is the head of the house, head of the wife, head of the family," petitioner treated only married men as automatically entitled to the supplement. Pet. App. A6. Neither the Bible nor church doctrine, however, mandated that petitioner pay male and female teachers different salaries. *Id.* at A30.

[3] For example, one female teacher was "rais[ing] two children on her teaching income after her husband, who had become disabled and mentally ill, left the family." Pet. App. A7.

[4] In September 1979, the Equal Employment Opportunity Commission joined as plaintiff after it became responsible for enforcing the equal pay provision of the Act. Pet. App. A8 n.2.

(d), and therefore sought back pay and injunctive relief. Pet. App. A8.[5]

a. On the Secretary's motion for partial summary judgment, the district court held that petitioner had violated the minimum wage provision of the Fair Labor Standards Act, 29 U.S.C. 206(a). 573 F. Supp. 320 (W.D. Va. 1983). The court con-

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[5] The Fair Labor Standards Act applies to a covered "enterprise," which the Act defines as

> the related activities performed (either through unified operation or common control) by any person or persons for a common business purpose, and includes all such activities whether performed in one or more establishments or by one or more corporate or other organizational units * * *. For purposes of this subsection, the activities performed by any person or persons—
>
> (1) in connection with the operation of a hospital, * * *, a school for mentally or physically handicapped or gifted children, a preschool, elementary or secondary school, or an institution of higher education (regardless of whether or not such hospital, institution, or school is public or private or operated for profit or not for profit) * * *
>
> shall be deemed to be activities performed for a business purpose.

29 U.S.C. 203(r).

The Act further defines a covered "[e]nterprise engaged in commerce or in the production of goods for commerce" as

> an enterprise which has employees engaged in commerce * * * and which
>
> * * * * *
>
> (5) is engaged in the operation of a hospital, * * *, a school for mentally or physically handicapped or gifted children, a preschool, elementary or secondary school, or an institution of higher education (regardless of whether or not such hospital, institution, or school is public or private or operated for profit or not for profit) * * *.

29 U.S.C. 203(s).

cluded that "Congress clearly intended the Act's minimum wage provisions to apply to church-operated schools," *id.* at 322 (citing 29 U.S.C. 203(s)(5)), and rejected petitioner's effort "to equate its lay, non-professional support personnel, such as bus drivers and cafeteria workers, with nuns, priests and others who are members of recognized 'religious orders'" exempt from the Act's coverage, 573 F. Supp. at 323. Finally, the court determined that the Act, as applied to petitioner's activities, did not violate the First Amendment. 573 F. Supp. at 324-327.[6]

b. In 1989, after holding a trial with an advisory jury, the district court also found petitioner liable for violating the equal pay provision of the Fair Labor Standards Act, 29 U.S.C. 206(d). 707 F. Supp. 1450 (W.D. Va. 1989). As an initial matter, the court "reaffirm[ed] its ruling that Congress clearly intended the Act to apply to church-operated schools." *Id.* at 1457 (citing *EEOC* v. *Fremont Christian School*, 781 F.2d 1362 (9th Cir. 1986) (29 U.S.C. 206(d) applied to a church-operated school)).[7] Moreover, the court again concluded that the Act, as applied to petitioner's activities, did not violate the First Amendment. 707 F. Supp. at 1458-1462. Turning to the alleged violation, the court found that the

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[6] The court later ordered petitioner to pay those 91 employees the stipulated total back pay award of $16,818.46. 707 F. Supp. at 1465.

[7] The court recognized that "persons who function as clergy are exempt from the Act." 707 F. Supp. at 1462 n.12. Here, the court found, "the employees for whom the government [brought] this action did not function in their jobs at the school as clergy, and [petitioner did] not seriously argue that the ministerial exception should apply to them." *Ibid.*

"parties' stipulations, together with the evidence, indicate that the head-of-household supplement [petitioner] paid between 1976 and 1986 was extended on the basis of sex." *Id.* at 1458. The court accepted the jury's finding "that the supplement was not based on a factor other than sex." *Ibid.* Accordingly, the court ordered petitioner to pay to all female teachers who were denied the "head-of-household" supplement the salary differential, the stipulated total back pay award of $177,630. *Id.* at 1464-1465.[8]

3. The court of appeals affirmed. Pet. App. A1-A46. The court first addressed petitioner's contention that its school was not an "enterprise" covered by the Fair Labor Standards Act. The court found that the statute "explicitly states that nonprofit schools [such as petitioner's] are within the scope of the Act." *Id.* at A14 (citing 29 U.S.C. 203(r) and (s)(5)). And the court, after reviewing pertinent legislative history, rejected petitioner's contention that the statutory language "does not demonstrate a clear 'affirmative intention' by Congress that the Act apply to church operated schools." Pet. App. A15 (quoting *NLRB* v. *Catholic Bishop*, 440 U.S. 490, 501 (1979)). The court pointed to a floor debate showing that Congress "assumed that [a parochial elementary] school was an enterprise." Pet. App. A17 (citing 112 Cong. Rec. 11,371 (1966)).[9] Ac-

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[8] The court denied the government's requests to award prejudgment interest and order injunctive relief. 707 F. Supp. at 1463-1465. The court of appeals affirmed those aspects of the district court's judgment. Pet. App. A45. The government has not sought further review of those claims.

[9] The court also noted that Congress, in 1977, amended the statute by creating an exemption for "religious or non-profit educational conference center[s]." 29 U.S.C. 213(a)(3).

cordingly, the court concluded that "the history of the statute demonstrates an affirmative intention by [Congress] to treat church-operated schools as enterprises." Pet. App. A18.

Petitioner also contended the teachers it hired were not "employees" under the Act, but rather qualified as "ministers" falling within the so-called "ministerial exemption." [10] The court found that petitioner's teachers "perform no sacerdotal functions [and do not] serve as church governors." Pet. App. A25. The court further found that the teachers "belong to no clearly delineated religious order." *Ibid.* "The economic reality," the court determined, was that petitioner's "teachers are employed as lay teachers in a church-operated private school." *Id.* at A27. The court therefore held that petitioner's teachers were "employees" under the Act.

Turning to petitioner's scattershot constitutional challenge to the Act as applied to its activities, the court first considered petitioner's claim under the Free Exercise Clause. The court determined that any

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court concluded, "if church-operated educational facilities had been excluded under the statutory definition of enterprise." Pet. App. A18.

[10] As the court explained, the Secretary had issued the following administrative guideline setting forth that exemption:

> Persons such as nuns, monks, priests, lay brothers, ministers, deacons and other members of religious orders who serve pursuant to their religious obligations in the schools . . . operated by their church or religious order shall not be considered to be "employees."

Pet. App. A23 (quoting U.S. Dep't of Labor, Wage and Hour Division, *Field Operations Handbook* § 10b03(b) (1967)).

burden on the exercise of petitioner's "sincerely-held religious beliefs" would be "limited." Pet. App. A28, A29. It noted that "[a]lthough [petitioner's] head-of-household pay supplement was grounded on a biblical passage, church members testified that the Bible does not mandate a pay differential based on sex." *Id.* at A30. The court further pointed out that "no [church] doctrine prevents [petitioner] from paying women as much as men or from paying the minimum wage," and that petitioner has fully complied with the Act since 1986. *Ibid.* On the other hand, the court concluded that the Act furthers governmental "interests of the highest order," *Wisconsin* v. *Yoder*, 406 U.S. 205, 215 (1972), namely, assuring workers a minimum standard of living and remedying gender-based pay discrimination in employment. Pet. App. A32-A33. In these circumstances, the court held, "the balance tips toward application of the [Act] to [petitioner]." *Id.* at A33.[11]

Applying the three-part test set forth in *Lemon* v. *Kurtzman*, 403 U.S. 602, 612-613 (1971), the court rejected petitioner's Establishment Clause challenge. Contrary to petitioner's assertion, the court concluded that the "ministerial exemption" did not create an "official preference" for the Roman Catholic Church. Pet. App. A36. The court explained that that exemption was "facially neutral, encompassing ministers, deacons, and members of religious orders in any

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[11] The court recognized that "[t]here is no principled way of exempting the school without exempting all other sectarian schools and thereby the thousands of lay teachers and staff members on their payrolls," a result that would "undermine the congressional goal of making minimum wage and equal pay requirements applicable to private as well as public schools." Pet. App. A33-A34.

faith, not exclusively Catholic nuns and priests." *Ibid.* Moreover, that exemption was "based on a determination that members of the clergy should not be characterized as employees, not on a decision to prefer any specific religion." *Ibid.* Such determinations, the court held, do not constitute violations of the Establishment Clause. *Id.* at A36-A37 (citing *Gillette* v. *United States*, 401 U.S. 437, 451-454 (1971)).[12]

The court next rejected petitioner's contention that the Act violated the equal protection component of the Fifth Amendment by effectively "discriminat-[ing] against adherents of religions that do not have formal religious orders." Pet. App. A39. The court treated this argument as "but another phrasing of first amendment arguments [it had] already considered." *Ibid.* (citing *Prince* v. *Massachusetts*, 321 U.S. 158, 170 (1944)). Following *Corporation of Presiding Bishop* v. *Amos*, 483 U.S. 327, 339 (1987), the court looked to whether "Congress has chosen a rational classification to further a legitimate end." Pet. App. A39. Here, the "ministerial exemption" was a "rational means of creating a buffer between church and state." *Ibid.*

Finally, the court of appeals rejected petitioner's challenges to the relief ordered by the district court. Reviewing the record with respect to the award for violating the equal pay provision, the court upheld the district court's "finding that [petitioner] failed

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[12] The court disposed of petitioner's claim that the Act "spawns impermissible government entanglement with religion" by noting that this Court had previously rejected an analogous contention in *Tony & Susan Alamo Foundation* v. *Secretary of Labor*, 471 U.S. 290, 305-306 (1985). Pet. App. A37-A38.

to carry its burden of proving that the salary differential was 'not based on a factor other than sex.'" Pet. App. A43 (quoting *Brewster* v. *Barnes*, 788 F.2d 985, 992 (4th Cir. 1986)). Petitioner also challenged the back pay award for violating the minimum wage provision, asserting that the district court "erred in not considering whether the work of these support staff members was performed for the church or for the school." Pet. App. A44. But the court of appeals found that petitioner pointed to "no evidence produced at trial that would provide a basis for distinguishing between church- and school-related labor." *Ibid.* In these circumstances, the court held, the trial court "did not err in awarding back pay based on the stipulation [between petitioner and the government]." *Id.* at A45.

ARGUMENT

1. Petitioner first contends (Pet. 17-22) that its school was not an "enterprise" covered by the Fair Labor Standards Act. The language of the statute forecloses that argument. By its terms, the Act defines a covered "enterprise" as including "a preschool, elementary or secondary school, or an institution of higher education (regardless of whether or not such * * * school is public or private or operated for profit or not for profit)." 29 U.S.C. 203(r)(1); see 29 U.S.C. 203(s)(5). Petitioner's school falls squarely within that straightforward definition. See, *e.g.*, *EEOC* v. *Fremont Christian School*, 781 F.2d 1362 (9th Cir. 1986); cf. *Tony & Susan Alamo Foundation* v. *Secretary of Labor*, 471 U.S. 290 (1985) (holding that the foundation was an "enterprise" under the Act despite its status as a tax-exempt nonprofit religious organization). Indeed, this Court has

long referred to church-affiliated schools as "private schools," see, *e.g.*, *Bob Jones University* v. *United States*, 461 U.S. 574, 577-579 (1983); *NLRB* v. *Catholic Bishop*, 440 U.S. 490, 497 (1979); *Pierce* v. *Society of Sisters*, 268 U.S. 510, 534 (1925), a practice that comports with the common understanding of that term, see, *e.g.*, *Black's Law Dictionary* 1206-1207 (5th ed. 1979);[13] U.S. Dep't of Education, *Digest of Education Statistics* 64-67 (25th ed. 1989) (classifying religiously affiliated schools as a type of "private school").[14]

Petitioner next contends (Pet. 22-29) that the teachers it hired were not "employees" under the Act, but rather qualified as exempt "ministers." The exemption petitioner invokes provides that

> [p]ersons such as nuns, monks, priests, lay brothers, ministers, deacons and other members of religious orders who serve pursuant to their religious obligations in the schools . . . operated by their church or religious order shall not be considered to be "employees."

Pet. App. A23 (quoting U.S. Dep't of Labor, Wage and Hour Division, *Field Operations Handbook* § 10b03(b) (1967)). By its terms, that exemption does not extend to lay teachers at a church-operated

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[13] That source defines a "private school" as

> [o]ne maintained by private individuals or corporations, not at public expense, and open only to pupils selected and admitted by the proprietors or governors, or to pupils of a certain class or processing certain qualifications (racial, religious, or otherwise), and generally supported, in part at least, by tuition fees or charges.

Black's Law Dictionary 1206-1207 (5th ed. 1979).

[14] For these reasons, petitioner mistakenly relies (Pet. 18-22) on *NLRB* v. *Catholic Bishop*, 440 U.S. 490 (1979).

school—the sort of employees at issue here. Moreover, that exemption, which stemmed from Congress's concerns that members of religious orders—not lay employees—be excluded from the Act's coverage, see, *e.g.*, 112 Cong. Rec. 11,371 (1966), has never been accorded a broader reach. Cf. *Rayburn* v. *General Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1169 (4th Cir. 1985) (applying "ministerial exemption" to Title VII), cert. denied, 478 U.S. 1020 (1986).[15]

2. a. Petitioner also argues (Pet. 29-33) that the "ministerial exemption" to the Fair Labor Standards Act, as applied to its activities, violates the equal protection component of the Fifth Amendment. That contention is groundless. The limited ministerial exemption to the Fair Labor Standards Act, like the statutory exemption at issue in *Corporation of Presiding Bishop* v. *Amos*, 483 U.S. 327 (1987) (Section 702 of the Civil Rights Act of 1964, 42 U.S.C. 2000e-1), "is neutral on its face and motivated by a permissible purpose of limiting governmental interference with the exercise of religion." 483 U.S. at 339. Accordingly, "[t]he proper inquiry is whether Congress has chosen a rational classification to further a legitimate end." *Ibid.* Here, as the court

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[15] Petitioner asserts (Pet. 24-26) that the decision below conflicts with *EEOC* v. *Southwestern Baptist Theological Seminary*, 651 F.2d 277 (5th Cir. 1981), cert. denied, 456 U.S. 905 (1982), and *McClure* v. *Salvation Army*, 460 F.2d 553 (5th Cir.), cert. denied, 409 U.S. 896 (1972). That assertion is mistaken since those decisions involved the "ministerial exemption" to Title VII, not the Fair Labor Standards Act. In any event, those decisions involved ordained ministers—individuals who fell within the terms of that exemption. Here, by contrast, the employees at issue fall outside the scope of the FLSA exemption.

of appeals recognized, the "ministerial exemption" was a "rational means of creating a buffer between church and state." Pet. App. A39.

b. Petitioner argues (Pet. 33-40) that the Act, as applied to its activities, violates the Free Execise Clause. In *Employment Division, Department of Human Resources* v. *Smith*, 110 S. Ct. 1595 (1990), this Court held that

> the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).

Id. at 1600 (internal quotation marks and citation omitted). The Fair Labor Standards Act falls comfortably within that category of laws and thus, as applied here, does not violate the First Amendment. Indeed, as the Court concluded in *Smith*, "if prohibiting the exercise of religion * * * is not the object of the [law] but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended." 110 S. Ct. at 1600.

Moreover, even assuming the more rigorous standard of review articulated in cases such as *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972), and *Sherbert* v. *Verner*, 374 U.S. 398 (1963), remains applicable, petitioner's constitutional claim still falters. As this Court has remarked, "[i]t is virtually self-evident that the Free Exercise Clause does not require an exemption from a governmental program unless, at a minimum, inclusion in the program actually burdens the claimant's freedom to exercise religious rights." *Tony & Susan Alamo Foundation* v. *Secre-*

tary of Labor, 471 U.S. at 303. Here, the Act imposed an insubstantial burden on petitioner's free exercise of religion since, as the court of appeals found, "no [church] doctrine prevents [petitioner] from paying women as much as men or from paying the minimum wage." Pet. App. A30.

As opposed to this "limited burden," Pet. App. A29, the minimum wage and equal pay provisions of the Act serve compelling government interests, *i.e.*, providing a minimum standard of living and eliminating pay discrimination between men and women. See, *e.g.*, *Corning Glass Works* v. *Brennan*, 417 U.S. 188, 195 (1974); *Mitchell* v. *Pilgrim Holiness Church Corp.*, 210 F.2d 879, 884 (7th Cir.), cert. denied, 347 U.S. 1013 (1954). In these circumstances, the court of appeals correctly held that "the balance tips toward application of the [Act] to [petitioner]," particularly where, as here, "[t]here is no principled way of exempting the school without exempting all other sectarian schools and thereby the thousands of lay teachers and staff members on their payrolls," a result that would "undermine the congressional goal of making minimum wage and equal pay requirements applicable to private as well as public schools." Pet. App. A33-A34.

c. Petitioner also renews its contention (Pet. 40-42) that the Fair Labor Standards Act, as applied here, violates the Establishment Clause. First, this Court's decision in *Tony & Susan Alamo Foundation* v. *Secretary of Labor*, 471 U.S. 290 (1985), forecloses petitioner's assertion of excessive "entanglement." There, the Court held that "routine and factual inquiries" concerning the Act's recordkeeping requirements "bear no resemblance to the kind of government surveillance the Court has previously held to pose an intolerable risk of government en-

tanglement with religion." 471 U.S. at 305. Second, the "ministerial exemption" is not the sort of denominational preference anathema to the First Amendment. Cf. *Larson* v. *Valente*, 456 U.S. 228 (1982). Here, the exemption is neutral on its face and includes clergy of all faiths. See Pet. App. A36. Moreover, as the court of appeals recognized, that exemption was "based on a determination that members of the clergy should not be characterized as employees, not on a decision to prefer any specific religion." *Ibid.*; see, *e.g.*, *Gillette* v. *United States*, 401 U.S. 437, 451-454 (1971).

3. Petitioner argues that it did not violate the equal pay provision of the Fair Labor Standards Act, 29 U.S.C. 206(d), by paying a "head-of-household" salary supplement to married male teachers, asserting that its policy "clearly was based on marital status." Pet. 43. The district court determined, however, based on the jury's finding of fact, "that the head-of-household supplement [petitioner] paid between 1976 and 1986 was extended on the basis of sex," not on the basis of marital or any other status. 707 F. Supp. at 1458. And the court of appeals expressly upheld that finding, concluding "that the salary differential was 'not based on a factor other than sex.'" Pet. App. A43 (quoting *Brewster* v. *Barnes*, 788 F.2d 985, 992 (4th Cir. 1986)). Petitioner offers no persuasive reason for this Court to depart from its practice of declining to review factual findings concurred in by both lower courts. See, *e.g.*, *Tiffany Fine Arts, Inc.* v. *United States*, 469 U.S. 310, 318 n.5 (1985); *United States* v. *Reliable Transfer Co.*, 421 U.S. 397, 401 n.2 (1975).[16]

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[16] Since the record shows that petitioner awarded its supplement on the basis of sex, not marital status, petitioner errs

4. Finally, petitioner contends (Pet. 45-47) that the district court erred in requiring it to show that underpaid employees' work was properly allocable to activities unrelated to its school. Petitioner stipulated that, during the years 1976 to 1982, it paid 91 persons hired as support personnel "[i]n the operation of [its] [s]chool" less than the hourly minimum wage mandated by the Act, C.A. Supp. App. 228, that these employees included bus drivers, custodians, kitchen workers, bookkeepers, and secretaries, and that the total wage shortfall amounted to $16,818.46. Pet. App. A7; C.A. Supp. App. 230-234. Petitioner, however, made no attempt to offer any "evidence * * * that would provide a basis for distinguishing between church- and school-related labor." Pet. App. A44. In these circumstances, the district court's awarding relief on the basis of petitioner's stipulation is unexceptionable.

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in suggesting (Pet. 43-44) that the court of appeals' decision conflicts with decisions upholding policies which treated all married persons alike. Petitioner's policy explicitly distinguished between married men and women.

Petitioner also asserts that the courts below erred in awarding relief to unmarried female teachers without dependents, because its "supplement was never considered applicable to any class except those with dependents, that is, married or formerly married." Pet. 44. That assertion is misleading. The record shows that one group of teachers received the supplement regardless of whether they had dependents—married men. In the court of appeals, petitioner tried to explain away the issue of gender neutrality by stating that "the answer * * * is self-evident—if [the male teacher was] married, the wife was a dependent." Pet. C.A. Reply Br. 22. Such a presumption, however, is scarcely gender-neutral, and thus is not a "factor other than sex."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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